DISSENT and Opinion Filed June 30, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00445-CV

THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, Appellant
V.
PAMELA RHOADES, Appellee

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-11649

CONCURRING AND DISSENTING OPINION

Opinion by Justice Bridges

Use or nonuse of the x-ray machine involved medical judgment, not use or nonuse of tangible property waiving immunity under the Texas Torts Claims Act (TTCA). The majority expands the recent holding in *University of Texas M.D. Anderson Cancer Center v. McKenzie*, 578 S.W.3d 506 (Tex. 2019), thereby misapplying statutory and legal authority to the underlying pleading to waive

sovereign immunity and create jurisdiction where none exists. Accordingly, I dissent from the majority's conclusion to the contrary.[1]

Standard of Review

The TTCA waives the state's immunity for certain negligent acts by governmental employees. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021; *McKenzie*, 578 S.W.3d at 512. A party suing the governmental unit bears the burden of affirmatively showing waiver of immunity. *McKenzie*, 578 S.W.3d at 512. To determine whether the party met this burden, we may consider the facts alleged by the plaintiff and the evidence submitted by the parties. *Id*. In doing so, we "construe the pleadings liberally, taking all factual assertions as true, and look to the plaintiff's intent." *Id*. (citing *Heckman v. Williamson Cty*., 369 S.W.3d 137, 150 (Tex. 2012)).

However, we focus on the true nature of the dispute rather than allowing artful pleading to gain favorable redress under the law. *Id.* at 513; *Arnold v. Univ. of Tex. Sw. Med. Ctr. at Dallas*, 279 S.W.3d 464, 470 (Tex. App.—Dallas 2009, no pet). We focus on the nature of the dispute between the parties and determine whether the claims are disguised attempts to plead around the TTCA. *Id.*

[1] I join in the majority to the extent it concludes UTSW waived immunity under the TTCA for negligent use of the sponge during the operation.

Rhoades's Second Amended Petition

In her second amended petition, Rhoades alleged the surgeons, radiologists, and radiologist technicians failed to utilize the radiology equipment to x-ray the entire surgical field. She further alleged the following relevant facts:

- The minimum standard of care that reasonable, prudent plastic surgeons, radiologist and radiology technicians should have provided under similar circumstances included obtaining an appropriate intraoperative x-ray was taken [sic] delineating the entire surgical field. Dr. Teotia, Dr. Haddock, the radiology technician and the radiologists involved in Pamela Rhoades's [sic] surgery failed to do this. The minimum standard of care that a reasonable, prudent plastic surgeon and radiologist should have provided under similar circumstances also included reviewing the x-rays, affirming that there was no sponge present and confirming that the film adequately included the entire surgical field.

- [I]f the appropriate intraoperative x-rays had been obtained, the second procedure to remove a retained foreign body would have been avoided for Pamela. . . . As a result of the inadequate x-rays, misuse of the x-ray equipment, delay in the procedure as a result of the use and misuse of equipment . . . Pamela required an additional opening of both the skin and fascial incisions to remove the foreign body.

- The injuries caused to Plaintiff were also caused by "use and misuse of the x-ray machines in the operating room by the surgeon and radiologist" during her procedure.

Waiver of Immunity Under the TTCA and Application of Section 101.021(2)

Section 101.021 provides, in relevant part, that "a governmental unit in the state is liable for . . . personal injury and death so caused by a condition or use of tangible personal or real property if the government unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM.

CODE ANN. § 101.021(2). Thus, to come within this limited exception, Rhoades must allege that her personal injury was proximately caused by the use of tangible personal property. *Id*. § 101.021(2); *McKenzie*, 578 S.W.3d at 519.

To "use" property in this context means "to put or bring [the property] into action or service; to employ for or apply to a given purpose." *McKenzie*. 578 S.W.3d at 513. A claim of "mere non-use" is insufficient to waive immunity; actual use is required. *Id*.

Here, UTSW does not dispute that it actually used tangible personal property. Rather, the issue is whether Rhoades's injuries were caused by "use and misuse of the x-ray machines in the operating room by the surgeon and radiologist" during her procedure. Stated differently, did Rhoades allege a misuse of the x-ray machine by UTSW that proximately caused her injury despite making no allegations that the x-ray machine itself was defective?

The majority, like Rhoades, relies on *Salcedo v. El Paso Hospital District*, 659 S.W.2d 30 (Tex. 1983), *Green v. City of Dallas*, 665 S.W.2d 567, 568–70 (Tex. App.—El Paso 1984, no writ), and *University of Texas Medical Branch Hospital at Galveston v. Hardy*, 2 S.W.3d 607 (Tex. App.—Houston [14th Dist.] 1999, pet. denied), to support waiver of immunity. These cases, however, rely on a prior version of the TTCA in which "an allegation of defective or inadequate tangible property" was not necessary to state a cause of action under the TTCA "if 'some use' of the property, rather than 'some condition' of the property, is alleged to be a

contributing factor of the injury." *See Salcedo*, 659 S.W.2d at 32 (noting liberal construction of TTCA required to achieve its purpose and "[t]o hold that the Act requires an allegation of defective or inadequate property when such an allegation is neither expressly nor impliedly required by section 3 would place a restrictive interpretation on the 'condition or use' language," which would violate legislative mandate to liberally construe act's provisions).

Two years after *Salcedo*, the legislature deleted the word "some" preceding "condition" and "use." *See Tex. Tech Univ. Health Sci. Ctr. v. Ward*, 280 S.W.3d 345, 349–40 (Tex. App.—Amarillo 2008, pet. denied).[2] Further, the mandate for liberal construction of the TTCA was repealed and not carried forward. *Id*.

Although intermediate courts have differed in their application of *Salcedo* since the amendments, the Texas Supreme Court specifically limited its holding to the particular facts of that case. *See Dallas Cty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 342–43 (Tex. 1998). The majority ignores the statutory revision and the limitation of *Salcedo* and its progeny claiming "[*Salcedo* and *Green*] address waiver for use of information, which is not *solely* at issue here." (emphasis added.)

[2] *See* Act of May 28, 1983, 68th Leg., R.S., ch. 530, § 1, 1983 Gen. Laws 3084, 3085; Act of May 14, 1969, 61st Leg., R.S., ch. 292, § 13, 1969 Tex. Gen. Laws 874, 877; Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3303.

While I agree Rhoades's pleading encompasses allegations other than use or misuse of information, which does not provide waiver under the TTCA, the majority contorts case law and Rhoades's allegations to reach its flawed conclusion that UTSW negligently used an x-ray machine.[3] Recognizing the limited applicability of *Salcedo*, the majority contends *Hardy* is "helpful to our analysis" because although *Hardy* relied on the analysis of the *Salcedo* court, "[*Hardy*] interpreted and applied the current version of the TTCA, which applies here." However, the Fourteenth Court of Appeals has disavowed its own analysis in *Hardy*. In *University of Texas Medical Branch at Galveston v. Kai Hui Qi*, 402 S.W.3d 382, 387 (Tex. App.—Houston [14th Dist.] 2013, no pet.), the court explained *Hardy* relied on *Salcedo* and *Salcedo* was based on a prior version of the TTCA. More recently, the court acknowledged, "We relied on *Salcedo* in deciding *Hardy* . . . but the law has changed . . . Given this change, the Texas Supreme Court has limited *Salcedo* to its facts. In doing so, the court removed the foundation on which *Hardy* was based."

[3] Rhoades's allegations of "reviewing," "affirming," and "confirming" x-ray films involves the use or misuse of information, which does not waive immunity under the TTCA. S*ee, e.g., Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 179 (Tex. 1994) (medical information recorded on paper is not tangible personal property and "*Salcedo* does not permit claims against the State for misuse of information"); *Univ. of Tex. Med. Branch of Galveston v. Crawford*, No. 14-18-00758-CV, 2019 WL 7372163, at *3 (Tex. App.—Houston [14th Dist.] Dec. 31, 2019, no pet.) (mem. op.) (true foundation of complaint was that UTMB failed to obtain the information that a timely second troponin test would have revealed). Doctors allegedly delaying the procedure because of the misuse of the x-ray machine is artfully pleading a failure to perform a diagnostic test, which is not a "use" of tangible personal property. *See Crawford*, 2019 WL 7372163, at *4; *see also Univ. of Tex. Med. Branch v. Thompson*, No. 14-06-00014-CV, 2006 WL 1675401, at *3–4 (Tex. App.—Houston [14th Dist.] June 20, 2006, no pet.) (mem. op.) (failure to perform ultrasound or CT considered a failure to act by state entity, which did not waive immunity under TTCA).

See Crawford, 2019 WL 7372163, at *4–5 (citation omitted). Importantly, the *Crawford* court acknowledged that although it cited *Salcedo* in *Hardy*, "we failed to note that *Bossley* limited *Salcedo* to its facts." *Id*. at *5 n.12.

Regardless, even setting aside the defunct legal underpinnings of *Hardy*, its underlying facts do not support the majority's conclusion. In that case, a patient was connected to a heart monitor, and although the monitor's alarm sounded when the patient's heart stopped, hospital staff allowed five minutes to pass before attempting resuscitation efforts. *Hardy*, 2 S.W.3d at 608–09. The court noted the cardiac monitor could be effective only if properly monitored at all times and the person responsible for monitoring it failed to do so, resulting in death "from the very condition that the proper use of the cardiac monitor was intended to avoid." *Id*. at 610.

The majority asserts "just as the cardiac monitor in *Hardy* was effective only if monitored by medical staff, the x-ray machine was only effective to locate foreign objects only if used on the entire surgical field." The majority then focuses on the evidence, which in hindsight, revealed the sponge was in fact in Rhoades's lower pelvic area, a part of the surgical field not x-rayed during the initial search in the operating room. However, Rhoades alleged her injuries were caused by "use and misuse of the x-ray machines in the *operating room* by the surgeon and radiologist" during her procedure.

The evidence reveals the following facts concerning the doctors' actions and use of the x-ray machine in the operating room. Dr. Sumeet Teotia and Dr. Nicholas Haddock performed a bilateral Deep Interior Epigastric Perforator (DIEP) flap reconstruction on Rhoades following a previous bilateral mastectomy at UTSW facilities. It is undisputed that at the conclusion of the surgery, there was an incorrect sponge count. Doctors and nurses spent several additional hours after completion of the procedure trying to locate and confirm the original sponge count. Dr. Teotia said he visually looked at both breasts and the abdomen that was open for the sponge. They used their fingers to feel around for it and used a lighter retractor to look inside her. Dr. Haddock could not recall who was leading the search, but "we were all looking through all of the various sites for a sponge and we did not find one."

Dr. Teotia did not have any independent recollection of ordering the x-ray but testified his team ordered "the chest and abdominal x-ray." Dr. Haddock testified there was no problem with getting the appropriate x-ray; rather, "[t]hey had the best x-ray that we could." The x-ray machine was positioned as low as it could possibly go in the flex position to cover the entire surgical field. Dr. Haddock testified "to our knowledge" the entire surgical field was x-rayed.

The radiologist did not report any problems obtaining the x-rays based on Dr. Teotia's orders or any problems positioning Rhoades while trying to find the sponge. Dr. Teotia admitted he would not have known where and how to place the plates to perform the x-ray, so he relied on the radiology technicians to perform the

appropriate x-ray of the surgical fields in an attempt to locate the missing sponge. He expected them to do it professionally and competently.

The radiology report indicates the chest and upper abdomen were included in the field of view. Dr. Haddock noted two parts in the report indicating the lower abdomen was included in the field of view: (1) the L1 vertebra, located right above the sacrum, was visualized; and (2) "Two scissors are noted, one in the right lumbar region and the other in the lower abdomen and mid-line likely over the surface of the patient."

Dr. Teotia testified, "We believe that the entire operative field was x-rayed. . . . We looked at the entire surgical field and did appropriate x-rays we thought necessary." Although Dr. Teotia repeatedly testified it was a "team effort," he admitted that as the attending surgeons, he and Dr. Haddock had the responsibility to ultimately determine what x-rays were appropriate and necessary. Dr. Teotia testified, "We let them know that we needed an x-ray of a certain part, and they do the x-ray."

Dr. Teotia believed they had adequate films and did not consider there was an area that could not be filmed. He thought "[he] had the entire operative field."

Dr. Teotia explained that he tried his best "to make operative decisions that [were] best for the patient and at the time, I did what was best for her, weighing the risks and benefits, looked for additional three-some hours, did all the x-rays that

were necessary when it was low in the abdomen and extubated her and took care of her as compassionate as I could."

Dr. Teotia spoke directly with the radiologist who read the x-rays and did not observe a sponge. When the radiologist reported the films did not identify a missing sponge, Dr. Teotia, relying on the x-ray results, concluded the sponge was not inside Rhoades.

Considering these facts against Rhoades's pleading of misuse of the x-ray machine for failing to capture the entire surgical field, it becomes clear she is artfully trying to plead around the TTCA. The x-ray machine did not cause her injury; instead, Dr. Teotia used medical judgment in ordering the x-ray and determining the scope of the operative field. Based on his medical judgment, the radiology technician took x-rays in the flexed position, which only in hindsight revealed the error in the decision regarding the scope of the surgical field. At the time the x-ray machine was used, it was used exactly as intended—it captured films of the entire surgical area designated by the attending surgeon.

We employed analogous reasoning in *Arnold v. University of Texas Southwestern Medical Center of Dallas*, 279 S.W.3d 464 (Tex. App.—Dallas 2009, no pet.). In that case, Arnold sued UTSW for negligent use of property when her doctor used larger breast implants than allegedly discussed prior to surgery. *Id*. at 466. Arnold alleged (1) use of the implants deformed her breasts; (2) use of the larger size increased her probability for experiencing sagging earlier than normal;

and (3) use of the larger size required additional surgery to correct the deformity. *Id*. at 470. She made no allegations that the implants themselves were defective. *Id*.

Focusing on the true substance of Arnold's pleadings, we concluded, "Any damages from the larger implants were caused by the alleged negligence of Dr. Chao in using his medical judgment to calculate the size of the implant he believed both parties had agreed upon." *Id*. Thus, Dr. Chao's errors in medical judgment did not waive immunity under the TTCA despite Arnold's pleadings identifying a piece of tangible personal property used during the procedure. *Id*.

The majority attempts to distinguish *Arnold* because the erroneous medical judgment in that case *preceded* and *prompted* the non-negligent use of the tangible personal property, thus rendering the use of property immune from suit. Its attempts are unavailing and ignore the evidence that at the time UTSW staff used the x-ray machine in the operating room (where Rhoades alleged the negligence occurred), Dr. Teotia and the radiology staff used medical judgment to determine the surgical field and such medical judgment preceded and prompted the x-rays. Based on their medical judgment, they believed the x-rays encompassed the entire surgical field. As such, without an allegation that the x-ray malfunctioned or performed defectively, Rhoades has not pleaded a cause of action waiving immunity under the TTCA. *See, e.g.*, *Thompson*, 2006 WL 1675401, at *2–3 (concluding allegations of improperly using medical diagnostic tools, including an x-ray, did not waive immunity because none of the property involved in treatment actually caused harm).

To the extent the majority claims my view disregards this Court's precedent in *Dallas County Hospital District v. Moon*, No. 05-17-00538-CV, 2017 WL 4546121, at *4 (Tex. App.—Dallas Oct. 12, 2017, no pet.) (mem. op.), the use of tangible personal property in that case is distinguishable from the present facts. In *Moon*, the patient was injured when hospital staff dropped the patient while transferring her from a wheelchair to the hospital bed. *Id*. at *1. Moon argued the hospital negligently used the wheelchair by removing its arms before attempting to lift her, which caused her injury. *Id*.[4] We concluded Moon pleaded the use of tangible personal property caused her injury and upheld the trial court's order denying the hospital's plea to the jurisdiction. *Id*. at 4. Unlike the wheelchair, whose arms hospital staff removed altering the condition of the property at issue (the very alteration Moon claimed caused her injury), Rhoades has not alleged the UTSW staff altered or changed the x-ray machine in any way.

Moreover, *Moon* does not change my conclusion regarding medical judgment in this case. Although *Moon* states the hospital argued the gravamen of the complainant was a failure in medical judgment, we dismissed the argument with little analysis. *Id*. at *4.

[4] Moon did not specifically plead that removal of the arms was a negligent use of property; however, she made the argument at the plea to the jurisdiction hearing. *Id*. at *3. Liberally construing Moon's pleadings, we determined she alleged negligent use of the wheelchair. *Id*.

The Texas Supreme Court has "recognize[d] that the distinctions we draw [are] problematic" in these cases. *See Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 588–89 (Tex. 2001). The court recently revisited application of the TTCA in *University of Texas M.D. Anderson Cancer Center v. McKenzie*, 578 S.W.3d 506 (Tex. 2019).

In *McKenzie*, the court decided whether the hospital's use of an allegedly improper carrier agent during surgery constituted negligent "use" of tangible property and, if so, whether sufficient evidence was presented that its use proximately caused the patient's death. *Id*. at 509, 513 ("whether actual use of non-defective property is sufficient to establish waiver where the complaint is not that the property was administered incorrectly, but that it should not have been used in the first place"). The McKenzies alleged the hospital was negligent in "misusing a fluid, tangible physical property, for chemotherapy under circumstances where it was reasonably obvious that it was not the appropriate fluid and posed a significant risk of serious harm to the patient, including the exact condition from which Courtney died." *Id*. at 510. The hospital argued that because the carrier agent was administered properly during surgery, the plaintiffs complained only of negligent medical judgment for which immunity is not waived. *Id*. at 509.

The court observed that immunity may be waived when an employee (1) furnishes property in a defective or inadequate condition causing injury or (2) improperly uses otherwise non-defective property to cause injury. *Id*. at 513. It was

undisputed no one alleged the carrier agent was used improperly but instead, that it should have *never been used at all*. *Id*. at 515.

While recognizing a complaint about medical judgment, without more, is insufficient to waive immunity, the court emphasized the negligence alleged by McKenzie did not involve only medical judgment. *Id*. "In other words, it was the use itself that caused the injury, and the fact that the property was administered properly or that the use of the [carrier agent] was preceded by medical judgment does not affect the analysis." *Id*. The "key" is that while medical judgment is necessarily involved in almost all actions or inactions taken by medical professionals, "it led to the use of property that was allegedly improper under the circumstances and caused harm." *Id*. at 516.

The *McKenzie* holding does not alter my conclusion in this case. Unlike the plaintiffs in *McKenzie*, who alleged that without the use of the particular property (the carrier agent) the injury would not have occurred at all, Rhoades has not alleged the x-ray machine should have never been used in the first place or without its use, her injury would not have occurred. *Id*. at 513 ("[T]he issue presented in this case is whether actual use of non-defective property is sufficient to establish waiver where the complaint is not that the property was administered incorrectly, but that it should not have been used in the first place."). As such, Dr. Teotia's medical decisions defining the scope of the surgical field did not lead to an improper use of the x-ray machine under these circumstances causing harm. *Id*. at 517 (recognizing

plaintiff must demonstrate use of particular property at issue was both improper under circumstances and caused injury); *see also Bossley*, 968 S.W.2d at 342 (mere involvement of tangible property leading to circumstances resulting in injury insufficient to meet causation requirement under TTCA). This conclusion comports with the legislative intent of limiting waiver of governmental immunity. *See Miller*, 51 S.W.3d at 585 (recognizing the TTCA allows suits against governmental units "only in certain, narrowly defined circumstances"); *see also McKenzie*, 578 S.W.3d at 517 (noting holding should not be painted "in overly broad strokes").

Conclusion

Rhoades's allegations regarding UTSW's use of the x-ray machine do not support waiver of its sovereign immunity under the TTCA. Her negligence claims alleging misuse of the x-ray machine are artfully pleaded complaints about UTSW surgeons' and radiology staff's medical judgments, rather than use or misuse of tangible personal property. Accordingly, the district court lacked jurisdiction over Rhoades's health care liability claims involving the x-ray machine, and such claims should have been dismissed. In all other aspects, the judgment should be affirmed.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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